"LETTERS I'VE WRITTEN, NEVER MEANING TO SEND . . .": CONDITIONAL RELEVANCE, EVIDENCE RULE 104(B), AND MARK EDWARDS' CURIOUS MURDER TRIAL

JAMES FAYETTE*
STEPHANIE BUSALACCHI**

ABSTRACT

With the 2002 double homicide case of State v. Edwards *as their backdrop, the Authors discuss Alaska Rule of Evidence 104(b) and the concept of conditional relevance. Using the example of a letter written by one of the victims in the* Edwards *case, the Authors explain how, although there was no evidence that the letter was ever mailed to or read by the defendant, the prosecutor correctly argued that the letter should be admitted into evidence at the criminal trial. The Authors then provide a history of Rule 104(b), discuss common applications of the rule, and present a guide for practitioners on how to conduct a Rule 104(b) analysis.*

TABLE OF CONTENTS

* J.D., Boston University School of Law (1988). B.A. History, University of Vermont (1985). The author is a state prosecutor with the State of Alaska, Department of Law in Anchorage. Opinions expressed in this Article are those of the authors. This Article is not a policy statement of the Criminal Division of the State of Alaska, Department of Law.

The authors gratefully acknowledge Alaska Court System Rules Attorney Nancy Meade, and her staff, for their gracious assistance in allowing the authors access to historical documents regarding the 1976–1978 drafting and promulgation of the Alaska Rules of Evidence.

** J.D. Candidate, Duke University School of Law (2010). B.A. English, The College of New Jersey (2007).

INTRODUCTION

How could a prosecutor ever hope to introduce into evidence the contents of a letter that no one can testify was ever sent or read? A letter that may have been the motive for a double-murder, or could just as easily never have been mailed? This quandary is precisely what a prosecutor faced several years ago in the murder trial of Mark Edwards. Trial attorneys should understand the reasoning behind the trial judge's ruling because they will gain valuable insight into a deceptively common evidentiary nuance: conditional relevance.

State v. Edwards[1] was a domestic violence double-homicide trial held in Anchorage in August 2002. Edwards was accused of murdering his estranged ex-wife and her roommate. The prosecutor offered

1. State v. Edwards, No. 3AN-S99-1269 Cr. (Alaska Super. Ct. Aug. 22, 2002).

evidence that, a few days before the murders, Edwards' ex-wife wrote a letter to Edwards in which she told him that she intended to leave him and Alaska forever.

The prosecutor offered testimony from a woman—a close friend of Mark Edwards' ex-wife—who read the letter just days before the murder. This witness testified that Edwards' ex-wife had written the letter and placed it in a stamped envelope, but had not decided whether she would mail it. The prosecutor's theory was that Edwards' ex-wife mailed the letter and that Edwards received it and read it. The prosecutor argued that the letter angered Edwards and provided his motive for the murders. But the prosecutor faced a daunting obstacle: no witness could testify that Edwards' ex-wife actually mailed the letter or that Edwards actually received or read it.

Given these facts, how could a judge ever admit evidence of the letter's content? What evidence rule governs admissibility? What threshold burden must the proponent sustain to trigger admissibility? How should the judge rule? What findings must a judge make to protect the case from appellate mischief and the specter of reversal? This Article discusses the answers to these questions, which are found in the liberal threshold for admissibility of conditionally relevant evidence in Alaska Rule of Evidence 104(b).

Seemingly obscure, Evidence Rule 104(b) is seldom cited in Alaska street-crime prosecution practice. However, the rule applies to a deceptively wide spectrum of evidentiary issues, many of which arise on a daily basis in Alaska criminal jury trial practice. As this Article explains, Rule 104(b)'s minimal threshold standard—"evidence sufficient to support a finding"—applies to disputed prosecution motive evidence, disputed Rule 404(b) acts, and a defendant's disputed admissions. Criminal trial attorneys frequently encounter all of these situations.

One would think that criminal practitioners—especially prosecutors—would have Rule 104(b) "in their back pocket." One would think that trial judges would be as familiar with Rule 104(b) as they are with the law of hearsay exceptions. But, in the Authors' opinion, this is not the case.[2]

Part I of this Article discusses the *Edwards* trial, which provides a compelling example of conditional relevance and an application of

2. When Author James Fayette told a very experienced prosecution colleague recently that this Article would focus on Evidence Rule 104(b), the colleague quipped, "Evidence Rule 104(b)? Who ever cites to that rule?" Another experienced prosecutor said, "Your article will probably be read about half as often as the rule is. Do the math . . ."

Evidence Rule 104(b). Part II analyzes the doctrine of conditional relevance, explains the rule's relationship to other evidentiary rules, and provides a practitioner's practical, step-by-step guide to using the rule. Part III discusses Rule 104(b)'s common trial applications.

I. MARK EDWARDS' TRIAL

A. Factual Background[3]

In November 1998, Mona Edwards filed for divorce from her husband, Mark, a man with a history of substance abuse and violent behavior. Mona moved out of the couple's small house in the Fairview area of Anchorage, and moved in with a friend, Maela Crabtree. Crabtree's home was located a few miles away from Fairview in Anchorage's Spenard neighborhood. Mark and Mona saw each other periodically in the weeks following the divorce filing. Mark wanted to reconcile; Mona did not.

On December 15, 1998, Mark spoke with Mona in the driveway of Maela's home. They argued after Mona refused to take a walk with Mark. Mark pushed Mona down on the driveway, spat at her, raised his hand, and extended his thumb and forefinger in an "L" shape. Ominously, Mark pointed his index finger at Mona and said "*pop!*," as if he had pulled the trigger on a gun, and then walked away.

That evening, Mona drove to the Anchorage courthouse with her close friend, Arlene Sanchez, to seek an emergency restraining order against Mark. Following a hearing, the order was issued and Mona and Arlene returned to Arlene's house in East Anchorage where they sat and talked. As they talked, Mona produced a letter from her pocketbook. Arlene later testified that Mona showed her a handwritten letter folded inside an unsealed envelope addressed to Mark at his Fairview address.[4] The envelope was stamped. Mona handed Arlene the completed letter and asked her to read it.

3. Author James Fayette was the *Edwards* trial prosecutor. Except where otherwise indicated, all information contained in the section on Mark Edwards' trial is derived from the Author's firsthand experience and from the *Edwards* trial transcript (Transcript of Record, State v. Edwards, No. 3AN-S99-1269 Cr. (Alaska Super. Ct. Aug. 22, 2002) (on file with the Alaska Law Review) [hereinafter "Trial Transcript"]).

4. Other trial evidence established that Mark received mail at the Fairview address. When police searched his house after the murders, they photographed other delivered mail at his house to prove that he was the resident. But police did not look for, or find, Mona's December 15th letter.

Arlene testified that Mona told Mark in the letter that she "hoped he would get on with his life and be happy, and to leave her alone, and to let her go." Mona wrote that she was leaving Alaska and returning to her family on the East Coast, and that she would stop paying the insurance for Mark's truck at the end of the month—barely two weeks away. Arlene testified that Mona closed the letter by telling Mark "she wanted [her] gun back."[5]

Arlene and her daughter both advised Mona that she should not mail the letter because they were afraid that it would anger Mark. Arlene testified that Mona did not say that she had decided to send the letter, but Mona did not say that she had decided against sending it, either.[6]

Three days later, on the evening of Friday, December 18th, Mark Edwards drove to Mona and Maela's home with a .22 caliber, two-shot Derringer—the same weapon that witnesses said Mark bought for Mona years earlier. When Maela answered the door, Mark forced his way inside and shot Maela once in the face, killing her. Mark then locked the front door from the inside and walked down to Mona's basement bedroom, where Mona was asleep. Mark shot Mona once in the head, killing her. Mark then re-loaded his Derringer and shot himself once in the head. The final bullet caused brain damage and severed his optic nerve but, incredibly, he survived.

---

5. Trial Transcript, *supra* note 3, at 1716. Other witnesses identified the weapon Mona referred to as a two-shot .22 caliber Derringer. Witnesses testified that Mark purchased the gun for Mona years earlier. When the couple separated, Mona left the gun with Mark. Before the divorce, Mark—unknown to Mona—loaned the gun to a friend. None of Mona's statements in the letter, as related by Arlene, constituted objectionable hearsay because the prosecution did not offer evidence of the letter's contents *for the truth of* what Mona wrote. *See* ALASKA R. EVID. 801(c) (hearsay is an out-of-court statement offered to prove the truth of the matter asserted). Mona's writings were only offered to prove the effect of the statement on the recipient, Mark. The letter was offered to prove Mark's motive. Mona's statements were relevant not because they were true, *but because they were uttered*. To the extent that any of the statements could be construed as hearsay, they would still have been admissible as statements of Mona's then-existing state of mind (Mona's intent to leave Alaska; her hope that Mark would be happy; her intent to stop insurance payments; and her desire to get her gun back). *See* ALASKA R. EVID. 803(3).

6. Arlene Sanchez testified, "Well, Mona was always slow with her reactions . . . . But she looked at me and she goes 'do you think[?]' And I said, 'Yes, that I think you shouldn't mail it'. . . . I do not know positively for sure that she mailed it, no. . . . She didn't—she didn't acknowledge the fact that I said that that's what I wanted her to do, and she did not tell me that she was not going to mail it. She didn't tell me. She left around 2:00 a.m. in the morning. . . . [w]ith the letter . . . . I think my daughter put it back in the envelope. . . . [S]he was the last one to read it." Trial Transcript, *supra* note 3, at 1717–18.

The next day, friends became alarmed when both Mona and Maela failed to make scheduled appointments and did not answer the telephone. Friends summoned police, who eventually broke into the house and discovered the two women's bodies. They also found Mark Edwards, severely wounded but alive, in the basement near his ex-wife's body.[7]

In the course of their investigation, the police interviewed Edwards' friend—the man with whom Mark had left Mona's Derringer. This friend testified that Edwards arrived at his house on Thursday evening, December 17th, and asked for the Derringer back. The friend testified that Edwards did not say why he wanted it, but that he gave the gun to Edwards. The prosecution's theory was that less than twenty-four hours later Mark Edwards used this very weapon to commit a double-murder and attempted suicide.

At Edwards' trial, the prosecutor offered Arlene Sanchez's testimony about the contents of Mona's letter. The prosecutor argued that strong circumstantial evidence showed Mona had, in fact, mailed the letter. The prosecutor argued that if Mona had mailed the letter on Wednesday after she left Arlene's house at 2:00 a.m., it might well have been delivered within one day—sometime on Thursday. If so, according to the prosecutor, this would explain why Mark asked his friend to return the Derringer that evening and why he used it to kill Mona the next day. The defense lawyer objected to the offer as speculative. No one saw Mona mail the letter. No one could testify that Mark read it. Why was it relevant? The defense lawyer argued,

> [H]ere we have . . . basically [prosecution] conjecture that Mona Edwards mailed this letter. . . . [Arlene] does not know whether it was mailed or not . . . . The letter was never found at Mark's house. It was never found in his truck. . . . [I]f you are going to say [the letter] has any relevance at all you have to show that he received it. And that's just pure conjecture.[8]

7. The *Edwards* prosecution had an extended pre-trial procedural history. The case triggered a three-year long series of competency hearings before Judge Andrews. Judge Andrews eventually ruled that Edwards was competent to stand trial. Edwards' trial commenced in August 2002. An account of the competency aspect of the case is beyond the scope of this Article.

8. Trial Transcript, *supra* note 3, at 1520–21. The prosecutor responded that the reason the police never found the letter was obvious—they had not interviewed Arlene Sanchez yet, and thus had no reason to look for the letter. Additionally, the police did not think that Mark Edwards was going to survive his self-inflicted gunshot wound. When the police searched Mark's house, they were primarily interested in locating addresses and telephone numbers for his next-of-kin.

The prosecutor responded, and characterized the issue as a one of conditional relevance, governed by Rule 104(b):

> THE COURT: What is the evidence that is sufficient to [support the finding] that it was read, that it was received?. . . .
> [THE PROSECUTOR]: *I want my gun back*?. . . . That's huge. *I want my gun back.* Then, . . . within hours . . . for no other reason, he's going to his friend and saying *I want that gun back*. That doesn't ground a reasonable inference that the gun is foremost in his mind[?] . . . [T]he same gun that's noted in the letter that was probably mailed on Wednesday and that he could have read on Thursday? That's a coincidence? A juror acting reasonably couldn't draw that connection? . . . *You want the gun back?* [Then he] kills her with that gun on Friday night or Saturday morning? A reasonable juror couldn't draw the connection between those events?[9]

At this point, however, Judge Andrews was not convinced. She focused on the time required for the letter to be delivered to Edwards:

> I think it's hopeful that one would've gotten the mail that [soon] . . . . even the court rule allows three days for mailing.[10] So . . . it would have [had to have caught] the right number of postal carts to have made it to his house so soon. I'm not saying that it's not possible, it certainly is possible. But it's not more likely than not that it came so quickly. . . . You're missing the piece for me that the letter could have actually reached there. I mean, if you want to bring in someone from the post office [who] says that something mailed between 1:00 a.m. and 3:00 a.m. in Anchorage could've been delivered . . . in the Thursday mail . . . . I'm happy to be educated on the speed of our mail.[11]

Judge Andrews sustained the defense objection for the moment, but she deferred final ruling until she heard testimony, outside the jury's presence, about Anchorage postal delivery times. Judge Andrews allowed the prosecution to call U.S. Postal Service Anchorage Administrator Jolene Carter to testify about delivery time for cross-town Anchorage mail. Ms. Carter testified that cross-town Anchorage mail is delivered within one day "always 95-plus percent" of the time.[12] Ms. Carter said that her testimony was based upon numerous external

9. *Id*. at 1527–28 (emphasis added).
10. *See* ALASKA R. CRIM. P. 40(d) (allowing three additional days to file a response when a litigant serves an opponent by mail).
11. Trial Transcript, *supra* note 3, at 1523, 1531–32.
12. *Id*. at 1674.

audits and U.S. Post Office quality control surveys with which she was very familiar.[13]

After Ms. Carter's credentials were established, the prosecutor asked her a hypothetical question: Assume that a properly addressed and stamped first class letter was mailed from an East Anchorage post box (near Sanchez' house) early in the day and addressed to a Fairview neighborhood location (Edwards' house). How long would it take for the letter to arrive at the recipient's address? Ms. Carter unequivocally responded, "One day."[14]

B. Analysis of Admissibility of Testimony About the Letter's Content

With Carter's testimony, the prosecutor referred Judge Andrews to Rule 104(b) and the leading conditional relevance case—*Huddleston v. United States*.[15] The prosecution cited Rule 104(b) because the defense objection to the admissibility of Mona's letter was really a relevance objection; the defense argued that the prosecution could not conclusively establish that the letter was ever mailed, let alone that Edwards received and read it. Therefore, the defense argued, testimony about the letter's contents was irrelevant: if Edwards was unaware of the letter, it was impossible that the letter was his motive for the murders.[16]

The prosecutor argued, however, that strong circumstantial evidence suggested that the letter actually was mailed, received, and read. The letter informed Mark that Mona intended to leave him for good, that she would stop paying his car insurance, and that before she left, she wanted her gun back. Thus, the letter was clear evidence of Mark's motive to kill his wife with the very gun she had asked him to

13. When Carter was asked to testify about her qualifications to offer an opinion about Anchorage delivery times, she responded, "Well, . . . my job that I have, I actually track that. I'm responsible for setting up the staffing and scheduling in order to meet the goals and the deadlines of the Anchorage Postal Service and meeting the delivery standards." *Id*. at 1701–02.

14. *Id*. at 1702.

15. 485 U.S. 681 (1988).

16. *Cf*. Byrd v. State, 626 P.2d 1057, 1059 (Alaska 1980) ("[O]ne cannot be fearful because of events about which one knows nothing."); *see also* Smith v. State, No. A-7964, 2004 WL 719993 at *4 n.5 (citing 2 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 389, at 417 (Chadbourn 1979) ("There is but one limitation [on the admission of evidence of a person's motive] that can be thought of as necessary and universal, namely, [that] the circumstance said to have excited the [person's] emotion must be shown to have probably become known to the person; because otherwise it could not have affected his emotions.")).

return. The prosecutor argued that if the jury believed the letter was mailed, received, and read, it could reasonably conclude that the letter was evidence of Mark's motive.

At Edwards' trial, Rule 104(b) was the only evidentiary obstacle to admission of testimony regarding the content of Mona's letter. The prosecution did not offer Mona's letter to establish the truth of what Mona wrote, so it was not hearsay.[17] Mona's letter, which would be strong circumstantial evidence of the perpetrator's identity, constituted powerful motive evidence in the context of a domestic violence homicide.[18] Therefore, admission of testimony regarding the letter's contents satisfied Evidence Rules 401 and 402.[19] Further, Evidence Rule 403 would not block admission of testimony about Mona's letter, as testimony about the letter was not "unfairly prejudicial" to Mark Edwards.[20] According to Arlene Sanchez, Mona's letter did not contain the vindictiveness one might expect in a "Dear John" letter. It did not contain bitter accusations of any marital or criminal misconduct. Testimony about the letter also would not confuse trial issues or constitute a distracting waste of time. In fact, Mona's letter was evidence that she still cared for Edwards. That fact might have "prejudiced" Mark Edwards in the sense that a juror might conclude that he killed a caring woman in cold blood, but that inference is not the sort of "unfair" prejudice against which Rule 403 protects.

Therefore, the issue was framed: Judge Andrews was confronted with a classic issue of conditional relevancy. If the letter was mailed, received, and read, it was relevant. If not, then it was irrelevant. If Rule 104(b) was satisfied, the prosecutor's evidence would be admissible.

17. *See supra* note 5.

18. Identity was actually contested at Edwards' trial. The defense argued that a sloppy police investigation focused too quickly on Edwards, who had been arrested inside a locked house with the bodies of two murdered women. The defense lawyers hypothesized that an unknown mystery killer could have shot Mona, Maela, and Mark, and then escaped into thin air. The defense lawyer argued in summation, "[W]e know there was a fourth person there. . . ." Trial Transcript, *supra* note 3, at 2032.

19. *See* ALASKA R. EVID. 401 (defining relevance; evidence is relevant if it makes existence of a disputed fact (e.g., the identity of the perpetrator) more probable than it would be without that evidence); ALASKA R. EVID. 402 ("All relevant evidence is admissible except as otherwise provided by [law]").

20. *See* ALASKA R. EVID. 403 (stating that relevant evidence may be excluded if it is unfairly prejudicial, confuses the issues, or constitutes a waste of time). As is often the case with evidence of this sort, the attorneys' argument over the letter, outside the jury's presence, consumed far more time than the actual trial testimony on the point.

C. Judge Andrews' Ruling

In the midst of Edwards' trial, the prosecutor argued in favor of admitting the letter:

> [T]he question is can a reasonable fact finder find by a preponderance that the predicate condition has been met; in this case—that the letter was sent and received. And as I conceded, the State's proof is circumstantial, but . . . it is reasonable to infer that if mailed early on Wednesday, there's a substantial chance . . . that the mail would have been received at a residential address, cross-town-mail, on Thursday. And then, when one combines that with the other circumstances we know, . . . Mr. Edwards, out of the blue, seeking out [his friend] on Thursday night to retrieve the gun that's mentioned in the letter, a reasonable . . . juror could find, by a preponderance, . . . that the predicate facts have been established by a preponderance. . . .

The prosecutor and the judge then had the following exchange:

> [THE PROSECUTOR]: So, I need not repeat or drone on about the circumstances . . .
> THE COURT: No.
> [THE PROSECUTOR]: . . . but . . . she wrote the letter, she said . . .
> THE COURT: Got it. Got it.
> [THE PROSECUTOR]: . . . she was going to mail it.
> THE COURT: Got it. Got it.
> [THE PROSECUTOR]: She addressed it, she . . .
> THE COURT: Got it.
> [THE PROSECUTOR]: . . . stamped it, and we've got the . . .
> THE COURT: Got it. Got it.
> [THE PROSECUTOR]: . . . occurrences on Thursday night.[21]
> THE COURT: Got it. Got it.
> [THE PROSECUTOR]: Thank you, Judge.[22]

Judge Andrews then ruled:

> [W]hat we have here, and that's why I'm asking for the information from the post office, is the [S]tate's going to bring in testimony to say a letter was written, stamped envelope, ready to go. I don't think the [S]tate needs to prove that it was, in fact, mailed. I think there's circumstantial evidence that the

21. Mark retrieved the gun from his friend on Thursday night.
22. Trial Transcript, *supra* note 3, at 1686–88.

> person had the intent to mail it. And then, the question for me was, well, is there evidence to show that if the letter was mailed, that it could've gotten there in the time frame that the [S]tate is talking about[?]. . . . And I think that this does make that connection. In other words, if she mailed it, it could've gotten there. . . . [W]ith the testimony from this post office person, the answer is, it could've gotten there. . . . [S]he could've mailed it and it could have gotten there. It's up to the jury to decide how much weight to give that. . . . [I]t's admissible.[23]

With this ruling, Judge Andrews allowed Jolene Carter to testify before the trial jury about the timing of mail delivery in Anchorage. She then allowed Arlene Sanchez to testify about the contents of Mona's letter. In summation, the prosecutor argued that when Mona Edwards mailed her letter, she essentially signed her own death warrant.[24]

II. ADMISSIBILITY OF CONDITIONALLY RELEVANT EVIDENCE ANALYZED: RULE-BY-RULE, STEP-BY-STEP

A. Commonly Encountered Conditional Relevance Examples

The issue that Judge Andrews encountered in the *Edwards* trial may seem novel, but conditional relevance is a deceptively common evidentiary issue. The issue is encountered almost daily in criminal trial practice, though only rarely will busy criminal practitioners and trial judges expressly invoke Rule 104(b) or frame an issue using the rule's terms. The following examples provide illustrations of how frequently criminal practitioners encounter conditional relevance issues.

- A prosecutor offers a document and asserts that the document is a letter written by the defendant, in which the defendant makes damning admissions that he committed a crime. The prosecution offers a lay witness who will testify that he is familiar with the defendant's handwriting, and, in his opinion, the letter was *really* written by the defendant. The defense attorney objects and explains that an expert document examiner will testify that the letter is *really* a forgery.[25]

23. *Id*. at 1691–92.
24. *Id*. at 2002.
25. This elegant example of how conditional relevance applies to authentication issues is drawn directly from EDWARD J. IMWINKELRIED, 5 EVIDENTIARY FOUNDATIONS § 4.01 (2002). It also resonates with an example cited

- In a domestic violence prosecution, the prosecutor offers evidence from the battered spouse that the defendant hit her on a previous occasion. The defendant objects, arguing that the prior episode was never reported to police and did not result in a court conviction. "Judge, how do we know what *really* happened on that prior occasion?"
- In a drug trafficking prosecution, the defendant is charged with possession of drugs and paraphernalia that were found in his backpack. At arrest, the defendant tells police that the backpack belonged to another person. The prosecutor offers evidence that the defendant, on a prior occasion, was arrested with crack pipes and cocaine paraphernalia. The prosecutor argues that the prior episode establishes the defendant's knowledge of what street drugs look like and rebuts the defense of innocent, unknowing possession. The defense attorney objects, arguing that the district attorney dismissed the prior criminal charge: "Judge, this is sandbagging. If the DA dismissed the charges back then, how are we supposed to figure out what *really* happened now?"
- In a homicide prosecution, the prosecutor offers evidence that the defendant had a motive to kill the decedent. The prosecutor offers to prove, circumstantially, that the defendant was aware of animosity between the decedent and the defendant's friends. The defense lawyer objects, and argues, "Judge, the prosecutor is just wildly speculating. How can they hope to establish what my client was *really* thinking?"

Although not explicitly stated, each of these trial objections is based upon conditional relevance principles and is governed by Rule 104(b). Under this rule, if the proponent of the evidence can establish that a factual issue is "reasonably debatable," the issue must be submitted to the jury.[26] The primary signal that an opponent is invoking a conditional

in the Commentary to Alaska's rule. "[I]f a letter purporting to be from Y is relied upon to establish an admission by him, it has no probative value unless Y wrote or authorized it." COMMENTARY TO THE ALASKA R. EVID. 104(b).

26. *See* Morgan v. State, 54 P.3d 332, 336–37 (Alaska Ct. App. 2002) (equating Rule 104(b)'s "evidence sufficient to support a finding" standard with the term "reasonably debatable"); *see also* Smith v. State, No. A-7964, 2004 WL 719993, at *5 (Alaska Ct. App. Mar. 31, 2004) (discussing a judge's "duty" to submit reasonably debatable factual issues to the jury).

relevance objection is often the opponent's invocation of the word "*really*."[27]

Thus, the question may be framed as follows: What quantum of proof must the proponent marshal to convince the judge to allow the jury to hear the evidence on the disputed point?

B. Step-by-Step Analysis Under Rule 104(b)

The relevance of disputed trial evidence will frequently depend on the proponent's "fulfillment" of a preliminary fact,[28] which is to say that it must be proven to be true. If a preliminary fact is proven, then the disputed evidence is probably relevant and should be admitted for the jury's consideration. On the other hand, if a preliminary fact is not proven, then the disputed evidence is irrelevant. This situation is the reason this concept is described as "conditional" relevance: the "condition" is the proponent's fulfillment of a preliminary fact.[29]

An opponent will often point to contradictory evidence, or a benign alternative explanation, and argue that the dispute itself renders denial of admission of testimony about the event indisputable. But, as the commentary to the Alaska Rules of Evidence recognizes, disputed issues of fact are the reason the court is holding a jury trial, and disputed facts are resolved by juries—not by judges.[30]

A leading commentator has described a judge's role in the conditional relevance context as one of "limited screening."[31] A judge does not weigh credibility;[32] he looks only to a proponent's evidence, not to an opponent's countervailing evidence.[33] In fact, the Alaska Court of Appeals has gone a step further and stated that a judge is required to view a proponent's evidence in the light most favorable to the proponent.[34] The judge is not required to find that a proponent has

27. The objection will often sound like this: "Judge, how do we know if that *really* happened?" or "How do we know if that (assertion, document, anecdote) is *really* genuine?"

28. COMMENTARY TO THE ALASKA R. EVID. 104(b).

29. *See id.*

30. *Id*. ("If preliminary questions of conditional relevancy were determined solely by the judge . . . the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed. Relevance questions are appropriate questions for juries.").

31. IMWINKELRIED, *supra* note 25, at § 4.01 ("[T]he judge initially plays a limited, screening role, and the jury then makes the final decision on the question of fact.").

32. Huddleston v. United States, 485 U.S. 681, 690 (1988).

33. IMWINKELRIED, *supra* note 25, at § 4.01.

34. *See* Smith v. State, No. A-7964, 2004 WL 719993, at *5 (Alaska Ct. App. Mar. 31, 2004) (holding that when reasonable jurors viewed the evidence at issue

actually proven a preliminary fact by a preponderance.[35] In fact, there is no requirement that the judge actually believe the proponent's evidence.[36] A judge merely asks whether a juror, acting reasonably, could find the preliminary fact established. If so, the evidence is admitted and the matter is submitted to the jury.

The Alaska Court of Appeals has explained that, where a proponent presents evidence "sufficient to support a finding" that a preliminary condition is fulfilled, the trial judge has a "duty" under Alaska Rule of Evidence 104(b) to allow the proponent to offer its evidence, so that a jury may decide the ultimate relevance of the evidence.[37]

Therefore, when disputed preliminary facts seemingly constitute an obstacle to admission of trial evidence, the step-by-step conditional relevance roadmap is as follows:

- Without weighing credibility of the sponsoring witnesses, the judge must determine if the proponent has offered evidence sufficient to support a finding that a preliminary fact is established;[38]
- The judge must next determine if the disputed evidence is logically relevant to a disputed trial issue;[39]
- The judge then must determine if admission of the disputed evidence is barred by some other evidence rule,

in the light most favorable to the State they could conclude that the evidence gave rise to motive).

35. *See Huddleston*, 485 U.S. at 690 ("In determining whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence.").

36. United States v. Maddox, 944 F.2d 1223, 1230 (6th Cir. 1991) (holding that a government witness, who thought that a defendant mouthed the words "you're dead" to her while she was on the stand, was properly allowed to testify about the threat even though the trial judge subjectively believed that the witness had misinterpreted the defendant's gesture). The court stated, "There is no general rule that a judge must believe evidence to be true prior to allowing evidence in. Rule 104(b) applies only to the situation where the relevancy of evidence depends on the truth of a fact other than the truth of the evidence being introduced. Otherwise, Rule 104(b) would require the trial judge to make factual findings regarding every piece of evidence introduced at trial." *Id.*

37. *Smith*, 2004 WL 719993, at *5. The court stated that, "[B]ecause the State's evidence was sufficient to support a finding that the necessary condition (Smith's awareness of the conflict) was fulfilled, it was the trial judge's duty under Evidence Rule 104(b) to allow the State to offer its evidence, so that the jurors could decide the issue of fact that would determine the ultimate relevance of the State's evidence."

38. *See* ALASKA R. EVID. 104(b).

39. *See* ALASKA R. EVID. 401; ALASKA R. EVID. 402.

such as the rule barring impermissible character evidence;[40]

- The judge must next determine if admission of the relevant evidence is barred by principles of "unfair prejudice" or waste of time;[41]
- Finally, upon an opponent's request, a judge should give a limiting jury instruction regarding the proper use of the evidence, reminding the jury that it is their task to determine whether the predicate fact has been proven.[42]

This step-by-step approach is consistent with the Alaska cases *Bennett v. Municipality*[43] and *Ayagarak v. State*,[44] discussed below.

C. Rule 104(b) and *Huddleston*

Alaska Rule of Evidence 104(b) governs preliminary questions of relevancy. The rule provides: "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."[45] The commentary to this rule explains:

> It frequently happens that two or more controverted facts are so related that evidence of one is inadmissible without evidence of one or more of the others. Thus when a spoken statement is relied upon to prove notice to X, it is without probative value unless X heard it. Or if a letter purporting to be from Y is relied upon to establish an admission by him, it has no probative value unless Y wrote or authorized it. Relevance in this sense has been labeled "conditional relevancy. . . ." In the case of conditional relevance, . . . [t]he judge makes a preliminary determination whether the foundation evidence is sufficient to support a finding of fulfillment of the condition. If

40. *See* ALASKA R. EVID. 404(b).

41. *See* ALASKA R. EVID. 403.

42. Wyatt v. State, No. 3607, 1997 WL 250441, at *4 (Alaska Ct. App. May 14, 1997), *aff'd*, 981 P.2d 109 (Alaska 1999).

43. 205 P.3d 1113, 1117 (Alaska Ct. App. 2009). 404(b)(4) evidence must still be relevant under Rule 402, and is also subject to Rule 403 exclusion; *see also* Smith v. State, No. A-7964, 2004 WL 719993 (Alaska Ct. App. Mar. 31, 2004) (analyzing disputed motive evidence first under Rule 104(b), and finally under Rule 403, as discussed below).

44. No. A-8066, 2003 WL 1922623, at *4 (Alaska Ct. App. Apr. 23, 2003) (outlining analysis under Rule 104(b), then Rule 402, then Rule 403, and finally a Rule 105 instruction).

45. ALASKA R. EVID. 104(b).

> so, the item is admitted. If after all the evidence on the issue is in, pro and con, the jury could reasonably conclude either that fulfillment of the condition is or is not established, the issue is for them . . . . If preliminary questions of conditional relevancy were determined solely by the judge . . . the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed. Relevance questions are appropriate questions for juries.[46]

In the *Edwards* trial, the prosecutor referred Judge Andrews to *Huddleston v. United States*.[47] Huddleston was prosecuted for possession of a trailer full of stolen videocassettes.[48] At trial, there was no question that the videocassettes were, in fact, stolen; rather, "the only material issue at trial was whether petitioner knew they were stolen."[49] The prosecution offered "other acts" evidence under Rule 404(b) to prove that Huddleston previously possessed stolen television sets and other appliances, thereby establishing Huddleston's knowledge that the videos had been stolen; however, Huddleston was never convicted of the prior acts.[50] Huddleston testified that he had acquired the television sets and other appliances legitimately.[51] Writing for a unanimous Court, Chief Justice Rehnquist explained,

> In determining whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. *The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact—*

46. COMMENTARY TO THE ALASKA R. EVID. 104(b). The Alaska Supreme Court "has [neither] adopted [n]or approved" the Commentary to the Rules of Evidence. *See* COMMENTARY TO THE ALASKA R. EVID., "Introduction." As the Alaska Court of Appeals recently noted, "the commentaries to the various evidence rules represent only the views of the Evidence Rules' main drafter, Professor Stephen A. Saltzburg, and not necessarily the views or the intentions of our supreme court." Tsen v. State, 176 P.3d 1, 8 (Alaska Ct. App. 2008). However, Alaska courts have long recognized the official commentary as persuasive. *See, e.g.*, Spenard Action Comm. v. Lot 3, Block 1, Evergreen Subdivision, 902 P.2d 766, 780 (Alaska 1995).

47. 485 U.S. 681, 690 (1988).

48. *Id*. at 682.

49. *Id*. at 683.

50. *Id*.

51. *Id*. In fact, the Government's proof to the contrary seemed less than compelling. "[T]he government's only support for the assertion that the televisions were stolen was [petitioner's] failure to produce a bill of sale at trial and the fact that the televisions were sold at a low price." *Id*. at 682.

here, that the televisions were stolen—by a preponderance of the evidence.[52]

Against this background, it is clear that Judge Andrews' ruling in the *Edwards* case was correct. Judge Andrews made no finding regarding the credibility of the prosecution's witnesses. She made no finding that Mona's letter was sent or received. Judge Andrews simply concluded that the proponent's evidence was sufficient to support a finding by the jury, by preponderance, that the letter was sent, received, read, and provided a motive for Mark Edwards to murder his wife and her friend. Having made this finding, she submitted the evidence to the jury and allowed them to decide if Mona's letter triggered the murders or not.

D. Historical Development of the Rule

Rule 104(b) embodies a principle that lies at the heart of the modern jury system—that our legal system entrusts juries, not judges, with the task of deciding disputed facts. Yet the rules of evidence reflect legal professionals' historic *distrust* of juries. The oft-expressed concern is that average citizens, untrained in the law, are too naïve to sift through unreliable data or to resist the temptation to decide cases based on emotion or equities rather than the law. Thus, modern evidentiary and procedural rules exclude entire categories of information from a jury's consideration because legal professionals deem such evidence to be too prejudicial, unreliable, or contrary to public policy.[53]

This distrust of juries is reflected in the distinction between Rule 104(a) and Rule 104(b). Under Rule 104(a), judges, not juries, are asked to decide legal questions regarding the admissibility of trial evidence. Judges decide whether a questioned communication is protected from disclosure by privilege, whether someone is competent to be a witness, or whether a hearsay exception applies to certain testimony.[54] These are legal conclusions entrusted to judges. On the other hand, Rule 104(b)

52. *Id*. at 690 (emphasis added).

53. *See* ALASKA R. EVID. 404(a) (character evidence); ALASKA R. EVID. 801 (hearsay); ALASKA R. EVID. 503–509 (privilege); *see also* John Leubsdorf, *Presuppositions of Evidence Law*, 91 IOWA L. REV. 1209, 1251 (2006) (discussing juror distrust in light of modern rules restricting admissibility of hearsay, character evidence, existence of insurance coverage, and settlement offers); Edward J. Imwinkelreid, *An Evidentiary Paradox: Defending the Character Evidence Prohibition by Upholding a Non-Character Theory of Logical Relevance, The Doctrine of Chances,* 40 U. RICH. L. REV. 419, 427 (2006) (arguing that jurors might convict based upon derogatory character evidence to protect society, rather than upon a finding that guilt was proven beyond a reasonable doubt).

54. *See* COMMENTARY TO THE ALASKA R. EVID. 104(a).

represents the alternate proposition: where admissibility depends on the connection of two or more *facts*, the judge decides only whether a jury could reasonably make a rational connection between the facts.

A detailed history of the drafting, adoption, and promulgation of the Alaska Rules of Evidence is beyond the scope of this Article, but a brief description may be helpful. Following the adoption of the Federal Rules of Evidence in 1975, then-Chief Justice Rabinowitz invited Professor Stephen Saltzburg to draft a proposed evidence code for Alaska state courts.[55]

In late 1976, Professor Saltzburg submitted a draft of proposed evidence rules, which was disseminated for Bar comment. The supreme court appointed an evidence rules advisory committee that met during 1977 and 1978. The advisory committee considered Bar comments, and ultimately submitted a proposed evidence code to the Alaska Supreme Court, along with commentary drafted by Professor Saltzburg.[56] Although the committee received considerable comment regarding some of the proposed rules, Rule 104(b) drew no comment and no controversy.[57] After making its own revisions, the supreme court voted on the proposed evidence rules one by one, and adopted Alaska's rules of evidence. The rules became effective on August 1, 1979.[58]

Professor Saltzburg's commentary to the evidence rules is traditionally published in the Alaska Rules of Court handbook,[59] and appears on the state court website.[60] While the commentary has never been formally adopted by the Alaska Supreme Court, it is regarded as persuasive.[61] Professor Saltzburg's commentary on Rule 104(b) is essentially identical to the Advisory Committee Notes for the analogous federal evidence rule—citing to the same provisions of the Uniform

55. Transcript of an address by Prof. Saltzburg to the Alaska Judicial Conference, Anchorage, Alaska (Dec. 16–17, 1976) at 2 (on file with the Alaska Law Review).

56. Report to the Alaska Supreme Court by the Committee on the Rules of Evidence (undated) (on file with the Alaska Law Review).

57. Alaska Court System Court Rules historical files; Supreme Court Order 364, documents drawer (available by appointment with the Court System Rules Attorney); Alaska Court System, Snowden Administration Building, 820 4th Avenue, Anchorage, Alaska.

58. Supreme Court Order 364, effective August 1, 1979.

59. ALASKA RULES OF COURT HANDBOOK (2009 ed.).

60. *See* ALASKA RULES OF EVIDENCE, *available at* http://www.state.ak.us/courts/ev.htm.

61. COMMENTARY TO THE ALASKA R. EVID., "Introduction"; *see also supra* note 46.

Rules, sister state evidence codes, and writings by Professor Edmund Morgan.[62]

Thus, the origins of Alaska's conditional relevance rule extend far beyond the adoption of Alaska's evidence code in 1979. The modern development of the conditional relevance principle dates from an early twentieth century case, *Gila Valley, Globe & Northern Railway Co. v. Hall*.[63] In that case, a workman was injured while riding along railroad tracks in a three-wheeled gasoline car provided by the rail company for his transportation as he measured the company's tracks.[64] While taking a turn, a wheel from the railcar came loose, causing the plaintiff to be thrown from the car onto the tracks, where he was run over.[65] He suffered serious injuries and sued the railroad for damages, alleging that the company was negligent and that the car's defect could have been found through reasonable inspection.[66] The trial court found in Hall's favor and the railroad appealed, contending that the court improperly refused to admit testimony that indicated the plaintiff may have overheard people discussing the wheel's defective appearance.[67] This testimony would have been relevant evidence because it would have negated the plaintiff's claim that he had not assumed the risk when riding in the car.[68] The defendant railroad wanted the testimony admitted with the instruction that if the jury believed the plaintiff heard the conversation, they could take that fact into consideration when deciding whether the plaintiff had assumed the risk.[69]

The Supreme Court held against the defendant, stating:

> We agree that the testimony was such as to render it a matter of doubtful inference whether Hall heard the conversation; but we think this question of fact was one to be determined by the trial court, and not by the jury. Questions of the admissibility of evidence are for the determination of the court; and this is so

62. FED. R. EVID. 104(b) advisory committee's notes (citing EDMUND MORGAN, BASIC PROBLEMS OF EVIDENCE 45–46 (1962) and CAL. EVID. CODE § 403).

63. 232 U.S. 94, 100 (1914). The phrase "conditional relevance" never appears in the *Gila Valley* opinion, but most commentators agree that the modern development of this rule begins with a discussion of this opinion. *See* Norman M. Garland, *An Essay On: Of Judges and Juries Revisited in the Context of Certain Preliminary Fact Questions Determining the Admissibility of Evidence Under Federal and California Rules of Evidence*, 36 SW. U. L. REV. 853, 854 n.8 (2008) (tracing the academic authority surrounding the rule's historical development).

64. *Gila Valley*, 232 U.S. at 97.

65. *Id*.

66. *Id*. at 97–98.

67. *Id*. at 102.

68. *Id*. at 100.

69. *Id*. at 101.

> whether its admission depend[s] upon matter of law or upon matter of fact.[70]

This facet of the *Gila Valley* opinion foreshadowed the modern distinction between admissibility based upon a *disputed legal principle*, which is now governed by Rule 104(a), and admissibility based upon a *disputed factual issue*, which is governed by Rule 104(b).[71]

The principle expressed in the *Gila Valley* opinion—that a judge, not a jury, decides relevance questions regardless of their legal or factual basis—did not create uniformity for relevance decisions on this point.[72] In fact, writing fifteen years after *Gila Valley*, Professor Edmund Morgan expressed discomfort with the wildly inconsistent practice in state courts on this point.[73]

In a seminal article on the topic, Professor Morgan drew a distinction between admissibility based on legal principles, which he called "competency," and admissibility based on a disputed fact, which we refer to today as conditional relevancy.[74] Morgan explained: "In theory, then, where the *relevancy* of *A* depends upon the existence of *B*, the existence of *B* should normally be for the jury; where the *competency* of *A* depends on the existence of *B*; the existence of *B* should always be for the judge."[75]

70. *Id*. at 103.

71. The commentary to Alaska Rule of Evidence 104(b) includes an example that is notably similar to the *Gila Valley* facts. "[W]hen a spoken statement is relied upon to prove notice to X, it is without probative value unless X heard it." COMMENTARY TO THE ALASKA R. EVID. 104(b). As we have seen, the commentary then explains that conditionally relevant facts are to be submitted to the jury. The inclusion of this example proves that the drafters clearly rejected the *Gila Valley* result. One might now argue that had *Gila Valley* been decided in 2009, rather than 1914, the outcome would have been completely different.

72. *Compare* Coghlan v. White, 236 Mass. 165, 167–68 (1920) ("It is the province of the judge, who presides at the trial, to decide all questions on the admissibility of evidence. It is also his province to decide any preliminary questions of fact, however intricate, the solution of which may be necessary to enable him to determine the other question of admissibility . . . ") *with* Hite v. Aydlett, 134 S.E. 419, 421 (N.C. 1926) (holding that the jury, rather than the judge, could decide if the contract was in writing). For further elaboration on this point, see John Maguire & Charles Epstein, *Preliminary Questions of Fact in Determining the Admissibility of Evidence*, 40 HARV. L. REV. 392 (1927).

73. Edmund Morgan, *Functions of the Judge and Jury in the Determination of Preliminary Questions of Fact,* 43 HARV. L. REV. 165, 170 (1929).

74. *Id*. at 171 (noting that the admissibility of a piece of evidence "depend[s] on its relevancy").

75. *Id*. at 169 (emphasis added).

The standard that Morgan articulated in 1929 foreshadowed the modern distinction between Evidence Rules 104(a) and 104(b).[76] Under Rule 104(a), a judge rules on the competence of witnesses, the application of privilege, the application of hearsay exceptions, the existence of co-conspirator statements, the exclusion of involuntary statements, and the sufficiency of a Miranda warning.[77] Thus, Rule 104(a) governs the court's resolution of disputed legal issues. Rule 104(b), however, governs factual controversies. Under Rule 104(b), the judge submits the evidence to the jury when there is a factual dispute that could be resolved in either party's favor. In other words, if the relevance of proffered evidence depends on a disputed factual issue, the judge merely determines whether the issue is "reasonably debatable."[78] If it is, the judge submits the matter to the jury for its decision.[79]

Professor Morgan also addressed the practical reasons why judges, not juries, should make preliminary legal rulings; his arguments are now the rationale for Rule 104(a). Writing almost forty-five years before the promulgation of the Federal Rules of Evidence, Morgan explained that it did not make sense to leave a ruling on a legal principle to the jury.[80] Morgan noted that "[i]t will not do to disregard realities,"[81] and he observed that even if a jury of lay people was competent to rule on legal questions regarding admissibility, it is a near impossibility that the jury members would be able to erase evidence from their minds should they conclude it was legally inadmissible.[82]

76. *See*, *e.g.*, IMWINKELREID, *supra* note 25, § 2.05(1); 1 HERBERT J. STERN & STEPHEN A. SALTZBURG, TRYING CASES TO WIN: EVIDENCE: WEAPONS FOR WINNING 491–528 (2000) (contrasting and explaining Rules 104(a) and 104(b)).

77. FED. R. EVID. 104(a).

78. Edmund Morgan, *supra* note 73, at 170 ("The judge does not require the plaintiff, as a condition to its reception, to prove to him [the conditioning fact]. It is sufficient for plaintiff to present evidence from which the jury might reasonably so find.").

79. Morgan v. State, 54 P.3d 332, 338 (Alaska Ct. App. 2002) (describing the Rule 104(b) test as one of reasonable debate).

80. Edmund Morgan, *supra* note 73, at 170 (holding that if ruling regarding application of privilege were left to juries, "[i]n many instances . . . the chief objective of the exclusionary rule would be destroyed. Where the exclusion is based on a policy of protection of an interest, nothing could be more absurd than to violate the interest and then to instruct the jury to repair the damage by disregarding the wrongfully extracted evidence. If a lawyer is compelled to repeat in open court the confidential communications of his alleged client, and the jury is told to disregard them in case they find the relationship exists, the harm of disclosure is beyond remedy.").

81. *Id*. at 168 (noting that because the jury already faces such obstacles as "vile ventilation, inadequate acoustics and limited light," they should not be imposed with additional burdens).

82. *Id*. at 168–69 ("[T]o expect the unskilled minds of jurors to do so is little short of ridiculous.").

In contrast, Morgan provided a variety of examples of what would come to be known as conditional relevance, noting that when admissibility turns on the determination of a particular fact, the decision must be for the jury and not the judge.[83] Morgan seemed particularly troubled by the judge's power to take away crucial fact-finding functions from the jury.[84]

III. COMMON TRIAL APPLICATIONS

In the past twenty years, the Alaska Court of Appeals has relied on conditional relevance principles several times to affirm admission of evidence regarding proof of a defendant's admissions, his commission of Rule 404(b) prior acts, and his awareness of facts giving rise to the motive to commit the crime. The following section examines some of these cases.

A. Disputed Motive Evidence

In the *Edwards* trial, the prosecutor offered Mona Edwards' letter because it was powerful motive evidence. Such disputed motive evidence is conceptually identical to a case decided by the court of appeals two years after the *Edwards* trial. In *Smith v. State*,[85] the defendant was charged with murder stemming from the execution-style shooting of an unarmed man named William Hall.[86] Smith shot Hall several times at point-blank range and ran away.[87] Fortunately, a police officer was nearby and responded to citizens' 911 calls within seconds.[88] The officer tracked Smith through the snow, following the only set of footprints leading away from the murder scene.[89] The officer found Smith in the woods several hundred yards from the murder scene,

83. *Id*. at 170.

84. *Id*. at 170–72 ("If the judge can determine such a matter, then by clever manipulation he can remove almost any material issue from the field of the jury.").

85. Smith v. State, No. A-7964, 2004 WL 719993 (Alaska Ct. App. Mar. 31, 2004). Author James Fayette was the *Smith* trial prosecutor. This Article examines many unreported Alaska appellate opinions. The Alaska Court of Appeals has held that litigants may cite unpublished opinions for "whatever persuasive power" the opinion may hold, but not as binding precedent. McCoy v. State, 80 P.3d 757, 764 (Alaska Ct. App. 2002) (interpreting ALASKA R. APP. P. 214).

86. *Smith*, 2004 WL 719993, at *1.

87. *Id*.

88. *Id.*

89. *Id.*

sitting on his jacket, changing his clothes, literally sitting on the murder weapon.[90]

Despite the strength of the physical evidence linking Smith to Hall's murder, the prosecution also sought to prove that Smith had a motive for the crime, since the two men appeared to be strangers.[91] The prosecution offered to prove that Smith was aware of Hall's pending divorce proceedings and that Hall had an antagonistic relationship with two of Smith's friends as a result of the divorce, arguing that this knowledge could have provided him with a motive to kill Hall.[92] Judge Mannheimer explained:

> Thus, the State's evidence of motive was conditionally relevant: it was relevant if the jurors inferred, from the circumstances, that Smith was aware of the conflict between his friends and William Hall. Of course, this inference was not ineluctable. But the inference was a reasonable one—that is, reasonable jurors (viewing the evidence in the light most favorable to the State) could conclude that Smith was aware of the circumstance (Fleury's and Pamela Hall's conflict with William Hall) that might engender the motive proposed by the State. . . . Because the State's evidence was conditionally relevant, and because the State's evidence was sufficient to support a finding that the necessary condition (Smith's awareness of the conflict) was fulfilled, it was the trial judge's duty under Evidence Rule 104(b) to allow the State to offer its evidence, so that the jurors could decide the issue of fact that would determine the ultimate relevance of the State's evidence: the issue of whether Smith was aware of the proposed motivating circumstance—the conflict between his friends and William Hall.[93]

Therefore, the *Smith* court affirmed the trial judge's ruling that the motive evidence was admissible, despite the fact that there was no direct proof that the Hall divorce played a role in Smith's motive.[94]

The *Smith* holding is consistent with *McCormack v. State*,[95] where the court of appeals once again held that that admissibility of Rule 404(b) motive evidence is governed by the same Rule 104(b) principle.[96] The *McCormack* court affirmed admission of evidence that McCormack committed two uncharged robberies during a crime spree to prove his

90. *Id*. at *1–2.
91. *Id*. at *4.
92. *Id*.
93. *Id*. at *5.
94. *Id*. at *4–6.
95. No. A-9870, 2008 WL 5352364 (Alaska Ct. App. Dec. 24, 2008).
96. *Id*. at *3–4.

motive to commit a third robbery.[97] The prosecution argued that McCormack committed the robberies because of serious financial difficulties.[98] The court of appeals specifically rejected the defense's claim that the trial judge should have been required to find, by clear and convincing evidence, that "the defendant actually committed" the uncharged crimes.[99] Rather, the court agreed that the prosecution had offered sufficient evidence to support the jury's finding that McCormack had committed the uncharged offenses and that the trial judge properly submitted the issue to the jury for its evaluation.[100]

B. Disputed Statement of Defendant

The court of appeals applied the same Rule 104(b) standard in *Marino v. State*.[101] Marino was charged with murder and attempted murder.[102] At trial, the prosecution called a witness to testify that, shortly before the murder, Marino boasted that he knew "what it felt like to kill someone," that "killing was a 'rush' like taking drugs," that it was "entertaining to watch someone begging for their life," and that when he said this, Marino laughed.[103] Marino disputed that he made the statements.[104] He also claimed that if he made the statements, it was not near the time of the charged murder.[105] On cross-examination, the witness equivocated about whether Marino actually made the statement on the day of the murder or a few days earlier.[106] Yet, the trial court admitted the statement, and the court of appeals affirmed, relying upon Rule 104(b).[107] Judge Mannheimer concluded that because a reasonable juror could find that Marino made the statement, the statement was admissible, and the defense was free to argue its credibility before the jury.[108]

97. *Id*. at *3.
98. *Id*. at *2.
99. *Id*. at *3. The 2008 *McCormack* court was presented with the issue as one of plain error and waiver, because this argument was not squarely presented to the trial judge. *Id*. However, the court approvingly cited and relied upon its 2003 *Ayagarak* opinion, *infra* note 113, reaffirming that opinion's validity. *McCormack*, 2008 WL 5352364, at *3.
100. *McCormack*, 2008 WL 5352364, at *3.
101. 934 P.2d 1321, 1329–30 (Alaska Ct. App. 1997).
102. *Id*. at 1324.
103. *Id*. at 1325.
104. *Id*.
105. *Id*.
106. *Id*. at 1329.
107. *Id*. at 1330.
108. *Id*.

The converse of this principle also applies. In Alaska, a suspect's silence in the face of an accusation may sometimes be admissible as an "adoptive admission." In *Bloomstrand v. State*,[109] the court held that although a prosecutor may not comment on a defendant's post-arrest silence, he may offer proof of the defendant's pre-arrest silence in the face of an accusatory question.[110] Such evidence often treads dangerously close to impermissible comment on the defendant's right to silence.[111] What if the defendant objects to a prosecution offer of adoptive admission testimony and claims he was aware of his *Miranda* rights and was exercising them? No Alaska case addresses the point, but federal authority holds that the prosecution must prove the *absence* of *Miranda* warnings under Rule 104(b) when offering testimony about the defendant's silence.[112]

C. Other Relevant Acts and Prior Crimes: Rule 404(b)

1. Prior Domestic Violence Offenses

In *Ayagarak v. State*,[113] the defendant was accused of assaulting his wife.[114] He defended himself at trial by claiming self-defense.[115] In response, the prosecution offered evidence that Ayagarak had assaulted his wife on three prior occasions.[116] Only one of the prior assaults had resulted in a conviction.[117] Of the two instances that did not result in a conviction, Ayagarak claimed that in one he acted in self-defense, and he denied the other event altogether.[118] Yet, the court of appeals affirmed the admission of the wife's testimony about all three prior

109. 656 P.2d 584 (Alaska Ct. App. 1982).

110. *Id.* at 588 (holding that a murder defendant's pre-trial failure to answer employer's question about why he did not call the police was admissible as an adoptive admission by silence); *see also* Doisher v. State, 658 P.2d 119, 120 (Alaska 1983) (holding that an accused's failure to speak in response to an accusatory comment is admissible as an adoptive admission where "an innocent man would in the situation and surrounding circumstances naturally respond").

111. *See* Silvernail v. State, 777 P.2d 1169, 1177 (Alaska Ct. App. 1989) (quoting People v. Conyers, 420 N.E.2d 933, 935 (N.Y. 1981) ("[T]he individual's silence in such circumstances may simply be attributable to his awareness that he is under no obligation to speak or to the natural caution that arises from his knowledge that anything he says might later be used against him at trial.")).

112. United States v. Cummiskey, 728 F.2d 200, 206 (3d Cir. 1984) (establishing that when offering evidence of silence, "it is the prosecutor's burden, under Rule 104(b), to establish that *Miranda* warnings were not given prior to the silence relied upon for impeachment purposes").

113. No. A-8066, 2003 WL 1922623 (Alaska Ct. App. Apr. 23, 2003).

114. *Id.* at *1.

115. *Id.* at *2.

116. *Id.* at *1.

117. *Id.* at *1–2.

118. *Id.*

assaults.[119] The court held that the minimal Rule 104(b) "conditional relevance" threshold governs the admissibility of prior bad acts.[120] The *Ayagarak* court determined that a reasonable juror could have believed the victim and could thus conclude that Ayagarak had committed all of the prior assaults.[121] The *Ayagarak* court noted that where the relevance of the prior-event testimony depends on a credibility assessment, such an assessment is properly in the province of the jurors, not the judge.[122] "Evidence Rule 104(b) normally leaves the resolution of a predicate fact to the jury—particularly when resolution of that disputed fact hinges on credibility."[123] The *Ayagarak* court specifically rejected a claim that the judge must determine that the prior event be proven by "clear and convincing" evidence as a predicate for admissibility.[124]

Very recently, the court of appeals faced a similar issue in *Bennett v. Municipality*.[125] Bennett was convicted of assaulting his wife.[126] On appeal, he contended that the court erred by admitting testimony about his prior assault of his wife under Alaska Rule of Evidence 404(b)(4).[127] Bennett argued that this prior incident should not have been admitted as a "crime of domestic violence" because he did not "assault" his wife on the prior occasion, but rather injured her in self-defense.[128] Judge Coats reasoned that the prosecutor had sustained her Rule 104(b) burden, even with the victim's testimony standing alone:

> In this case, the Municipality offered sufficient evidence for a reasonable juror to conclude that the 2005 incident was an act of domestic violence: Celeste Bennett testified that, after she insulted Steven during an argument, he knocked her to the ground, hit her repeatedly on the side of her face and choked her, leaving her with two black eyes, bruises on her neck, and broken blood capillaries in her right eye. Once the court made the preliminary finding of sufficient evidence required by Evidence Rule 104(b), the strength of the Municipality's evidence of the prior act was just one factor for Judge Swiderski to consider in balancing the probative value of the

119. *Id.* at *2.
120. *Id.* at *5.
121. *Id.* at *2.
122. *Id.* at *5.
123. *Id.*
124. *Id.* at *6. In the domestic violence context, the Ninth Circuit reached the same conclusion in an opinion issued nine years before *Ayagarak*. United States v. Hinton, 31 F.3d 817, 823 (9th Cir. 1994).
125. 205 P.3d 1113 (Alaska Ct. App. 2009).
126. *Id.* at 1114.
127. *Id.*
128. *Id.*

> evidence against the risk that Bennett would be unfairly prejudiced. Judge Swiderski determined that the evidence should not be excluded under Evidence Rule 403; it then became the jury's duty to evaluate the credibility of the Bennetts' conflicting testimony on this incident, and to decide what weight, if any, to give the evidence in assessing Bennett's guilt of the charged assault.[129]

In *Bennett*, we encounter a classic application of Rule 104(b) and the judge's limited gate-keeping role. Because admissibility of Bennett's prior assaultive act hinged on a credibility determination (whether the jury believed Bennett or his wife), the judge's proper role was simply to inquire whether a juror, acting reasonably, could find that Bennett had committed the prior assault. The judge was not required to rule that the prior assault had actually occurred,[130] to find the prior event proven by "clear and convincing evidence,"[131] or to weigh the credibility of witnesses.[132] Rather, under *Smith v. State*, the judge was required to view the evidence in the light most favorable to the proponent.[133] In other words, the judge could not properly refuse to admit the evidence because he did not personally believe that Bennett had acted in self-defense on the prior occasion. Such a decision would have been an improper invasion on the role of the jury and on the prosecution's right to have the jury resolve disputed facts.[134]

2. Drug Crimes

Criminal law practitioners routinely confront conditional relevance issues in street drug prosecutions. A defendant will often admit that he was present at a location where police seized drugs and contraband but claim that he was unaware that drugs were present. In such cases,

129. *Id*. at 1117–18 (citation omitted).

130. *See* Huddleston v. United States, 485 U.S. 681, 690 (1988) ("[T]he trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact.").

131. *See* Ayagarak v. State, No. A-8066, 2003 WL 1922623 at *6 (Alaska Ct. App. Apr. 23, 2003).

132. *See Huddleston*, 485 U.S. at 690 ("In determining whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence.").

133. *See* Smith v. State, No. A-7964, 2004 WL 719993, at *5 (Alaska Ct. App. Mar. 31, 2004).

134. *See* ALASKA R. EVID. 104(b) advisory committee's notes ("If preliminary questions of conditional relevancy were determined solely by the judge . . . the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed.").

prosecutors will typically offer evidence of the defendant's prior drug crimes to establish the defendant's knowledge about what drugs look like and how they are packaged, to demonstrate absence of mistake or accident.[135] But what if those prior drug crimes have not resulted in convictions? The court of appeals has relied on Rule 104(b) to reach the same result as the *Ayagarak* and *Bennett* courts.

In *Goan v. State*,[136] the defendant was charged with selling LSD to an undercover informant.[137] The trial judge admitted evidence that the informant had bought LSD on three prior uncharged occasions, in the weeks before the charged sale.[138] The informant could not testify that Goan had directly participated in the prior sales.[139] The trial judge, however, admitted the testimony because the circumstances of the prior sales were similar.[140] Judge Coats explained:

> In determining whether the state has introduced sufficient evidence to satisfy Rule 104(b), the court examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact by a preponderance of the evidence. The trial court neither weighs credibility nor makes a finding that the state has proved the conditional fact. . . . Considering all the evidence, a question of fact was created as to whether [the undercover police officer] had dealt with Goan in the previous transactions. A reasonable juror could infer from the evidence that there was a consistent pattern in the four transactions. Given the similarity of the details, a juror could conclude that the details of who was involved and where they did business were also the same. Therefore, Judge Savell acted within his discretion in allowing the evidence of the three prior sales to go to the jury for factual determination.[141]

135. *See* ALASKA R. EVID. 404(b)(1); *see also* Cunningham v. State, Nos. A-6717, 4090, 1999 WL 602980 (Alaska Ct. App. Aug. 11, 1999); Valcarcel v. State, No. A-6741, 1999 WL 296286 (Alaska Ct. App. May 12, 1999); Backus v. State, No. A-5904, 1997 WL 216823 (Alaska Ct. App. Apr. 30, 1997) (all affirming admission of evidence of prior drug offenses to establish knowledge and absence of mistake or accident); Clark v. State, 704 P.2d 799, 806 (Alaska Ct. App. 1985) (affirming admission of defendant's possession of a set of weighing scales to prove intent to sell marijuana).

136. No. A-2908, 1989 WL 1597111 (Alaska Ct. App. Dec. 13, 1989).

137. *Id.* at *1–3 (citing *Huddleston*, 485 U.S. at 690).

138. *See id.* at *4.

139. *Id.*

140. *Id.* at *5.

141. *Id.*

3. Spoliation: Witness Threats, Intimidation and Cover-up Behavior

Alaska law holds that spoliation conduct—a defendant's threats to witnesses, attempts to bribe police officers or witnesses, and attempts at evidence tampering—are admissible to prove a defendant's consciousness of guilt.[142] This is true even where the questioned conduct is committed by third parties.[143] In street crime prosecution, third-party attempts to silence or intimidate adverse witnesses are not uncommon. What standard of proof must the proponent sustain to trigger admissibility of the third-party conduct? No Alaska case squarely answers the question.[144] But, the defendant's connection to the intimidation attempt—just as his awareness of facts that give rise to his motive—is a disputed factual issue. If the defendant authorized or encouraged the intimidation, the evidence is relevant to show his consciousness of guilt. Therefore, the issue raises a disputed factual issue, and a judge should analyze the point under Rule 104(b).

D. Authentication

Criminal trial practitioners frequently confront evidentiary disputes regarding authentication issues. Yet, practitioners very rarely frame debates regarding authentication of photographs or audio recordings in conditional relevance terms. But, in fact, the concepts are very closely intertwined. Consider these examples:

- Narcotics detectives record an informant's telephone conversation with a man setting up a cocaine deal. Police later arrest a man they believe to be the seller and whose voice they believe they can identify on the tape. The

142. *See, e.g.*, Garrett v. State, No. A-6266, 1997 WL 1865, *5 (Alaska Ct. App. Jan. 2, 1997) ("Evidence that Garrett offered to give Officer Stevenson something if the officer let him go home is admissible to show Garrett's consciousness that he was intoxicated and that he was driving with a suspended license.").

143. Stumpf v. State, 749 P.2d 880, 898–99 (Alaska Ct. App. 1988) ("Evidence that a third party attempted to intimidate a witness is admissible against a defendant as manifesting a consciousness of guilt. The state, however, must first establish that the defendant authorized the actions. The defendant's connection to the threats may be shown by direct or circumstantial evidence."); *see also* Wortham v. State, 617 P.2d 510, 512 (Alaska 1980) (quoting Saunders v. State, 346 A.2d 448, 450–51 (Md. Ct. App. 1975) ("[T]he authorization by the accused may be proved by direct or circumstantial evidence and an inference may be sufficient to connect the accused.")).

144. Federal authority does provide an answer. In United States v. Maddox, 944 F.2d 1223, 1226 (6th Cir. 1991), a government witness testified that the defendant threatened her during a trial recess. The defendant denied it, and testimony from the court security officer was ambiguous. *Id.* The Sixth Circuit held that the issue was governed by Rule 104(b). *Id.* at 1229–30.

defendant denies that he is the speaker and argues that he has a brother whose voice sounds like his.

- Police seize a photograph of a man engaged in a sexual act with a young person from the man's computer. Police assert that the photograph depicts the computer owner having sex with a minor, and they arrest the man. Police assert that they can identify the man but are unable to identify the young person. Police maintain that they are able to establish the location of the photograph circumstantially and the age of the second person by close examination of the computer's electronic data and careful review of the room depicted in the photograph itself. The defendant makes no admissions regarding whether he is the person depicted in the photograph, whether the other person is a child, or the location of the photograph.

How does a judge resolve these authentication problems? Alaska Rule of Evidence 901 governs authentication, and states, "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."[145] Thus, Rule 901 uses the same rubric as Rule 104(b): the standard of "evidence sufficient to support a finding."[146] In fact, the Alaska Rule's commentary expressly links Rule 901 with Rule 104(b), noting that "[t]his requirement of showing authenticity or identity falls in the category of relevancy dependent upon fulfillment of a condition of fact and is governed by the procedure set forth in Rule 104(b)."[147]

Under Rule 104(b), the order of proof is left to the discretion of the trial judge.[148] The proponent "need only make a prima facie showing of authenticity, as 'the rule requires only that the court admit evidence if sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity or identification.'"[149] After the evidence has

145. ALASKA R. EVID. 901.

146. ALASKA R. EVID. 104(b).

147. *See* ALASKA R. EVID. 901 (citing FED. R. EVID. 901 advisory committee's notes). The advisory committee's notes to Federal Rule of Evidence 901 draw the same link to Federal Rule of Evidence 104(b). *See, e.g.*, United States v. Black, 767 F.2d 1334, 1342 (9th Cir. 1985).

148. FED. R. EVID. 104(b) advisory committee's notes.

149. United States v. Black, 767 F.2d 1334, 1342 (9th Cir. 1985) (citing 5 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE para. 901(a)(01), at 901-16 to 901-17 (1983)); *see also* Ricketts v. City of Hartford, 74 F.3d 1397, 1411 (2d Cir. 1996) (disapproving a judge's ruling excluding a tape recording where the judge did not believe that the recorded voice was the defendant's). "The district court's determination that it 'was not satisfied that the voice on the tape was that of

been admitted, "[t]he credibility or probative force of the evidence offered is, ultimately, an issue for the jury."[150]

Alaska courts have consistently applied this principle. In *Dillard v. Municipality of Anchorage*,[151] a defendant objected to admission of a recording of his arrest made by a police officer with a pocket recorder.[152] The defendant argued that the tape was garbled and claimed that it was difficult to determine whose voices were actually captured on the tape.[153] The court of appeals ruled that the issue was governed by Rule 104(b), and therefore, as long as the judge found that the jury had a "reasoned basis" to conclude that the defendant's voice was on the tape, "this issue was for the jury to decide."[154]

The court of appeals reached the same result four years later in *Wyatt v. State*.[155] Wyatt was tried for killing his wife.[156] The prosecutor offered testimony from a crisis center worker, who testified that the day before the victim disappeared, she had received a call from a woman who identified herself as "Diane Wyatt," asked about divorce, and said that "there was a possible lethal situation when she told her husband about [the divorce]."[157] The defense argued that the evidence establishing the identity of the caller as Wyatt's wife was insufficient.[158] The court of appeals held that the judge properly submitted the issue to the jury, even in the face of the factual dispute.[159] The *Wyatt* court noted that the judge gave a proper limiting instruction and told the jury to consider the testimony about the call "if you find that she made the statement."[160]

Davis,' is inconsistent with [Rule 104(b)] principles. So long as a jury is entitled to reach a contrary conclusion, it must be given the opportunity to do so." *Id.* (citation omitted).

150. *Black*, 767 F.2d at 1342.

151. No. A-4496, 1993 WL 13156859 (Alaska Ct. App. Oct. 13, 1993).

152. *Id.* at *4–5.

153. *Id*.

154. *Id*. (citing ALASKA R. EVID. 104(b) advisory committee's notes); *see also* James v. State, 671 P.2d 885, 893 (Alaska Ct. App. 1983), *rev'd on other grounds*, 698 P.2d 1161 (Alaska Ct. App. 1985) (reaching the same result without referring to Rule 104(b); affirms the admissibility of a recording of a 911 call despite the fact that the identity of the caller was disputed).

155. No. 3607, 1997 WL 250441 (Alaska Ct. App. May 14, 1997), *aff'd*, 981 P.2d 109 (Alaska 1999).

156. *Id.* at *1.

157. *Id*. at *3.

158. *Id*. at *4 n.2.

159. *Id*.

160. *Id*; *see also* Hough v. State, No. A-6359, 1998 WL 253998, at *5–6 (Alaska Ct. App. May 20, 1998). In *Hough*, there was an issue regarding admission of testimony about a telephone call in which defendant admitted to a shooting. *Id.* at *5. The speaker's identity was supported by the context of the conversation, nicknames used, sound of the speaker's voice, the witness's familiarity with the

Most recently, in *Thompson v. State*,[161] Thompson was charged with sexual abuse of a minor for having sex with a thirteen-year-old girl.[162] During the investigation, police obtained a *Glass* warrant that authorized surreptitious recording of telephone conversations between Thompson and the girl's mother.[163] The investigating officers left the recording equipment with the mother.[164] She then recorded two conversations in which Thompson admitted to both knowing the girl was thirteen years old and to having sex with her.[165] No law enforcement officer was present when the calls were recorded.[166] Before trial, the defense objected to the admission of the tapes, arguing that no law enforcement officer could authenticate the tapes or testify about the precise date that the conversations occurred.[167]

The court of appeals held that Rules 901 and 104(b) governed the issue, stating: "[t]hus, the modern test for authentication 'is . . . [whether] the proponent [of the evidence has] presented sufficient evidence to support a rational finding [that] the tape recording is authentic.'"[168] The court held that evidence questioning the authenticity of a recording may be introduced to attack the credibility of the recording, but does not bar its admission into evidence.[169]

The *Thompson* court also noted that Rules 901 and 104(b) govern the threshold standard for admission of a photograph.[170] In fact, the court of appeals had reached the same conclusion twenty years earlier. In *Bell v.*

---

defendant, and the witness's opinion that defendant was the caller. The court held that admissibility was governed by Rules 104(b) and 901. *Id.* (citing United States v. Watson, 594 F.2d 1330, 1335 (10th Cir. 1979) (stating "once '*any* basis for identifying the voice' has been shown, questions of weight and credibility are for the jury")); *see also* State v. Danielson, 681 P.2d 260, 261 (Wash. Ct. App. 1984) (holding the identification requirement is "met if sufficient proof is introduced to permit a reasonable trier of fact to find in favor of identification")).

161. 210 P.3d 1233 (Alaska Ct. App. 2009).

162. *Id.* at 1233.

163. *Id*. at 1234; *see also id.* at 1234 n.2 (citing State v. Glass, 583 P.2d 872 (Alaska 1978) (holding that under the Alaska Constitution, the police "must obtain a warrant before electronically monitoring or recording a private conversation," even if one of the participants has consented to the surveillance)).

164. *Id*. at 1234.

165. *Id*.

166. *Id*.

167. *Id*. at 1234–35.

168. *Id*. at 1238–39 (citing EDWARD J. IMWINKELRIED & DANIEL D. BLINKA, CRIMINAL EVIDENTIARY FOUNDATIONS 134 (2d ed. 2007)). For a helpful discussion of the interplay between Rules 104(b) and 901 in the context of questioned surveillance audio and videotapes, see United States v. Stephens, 202 F.Supp. 2d 1361, 1367–68 (N.D. Ga. 2002).

169. *Thompson*, 210 P.3d at 1239.

170. *Id*.

State,[171] the victim equivocated about whether her injuries, which were depicted in police photographs, were actually caused by the defendant.[172] At trial, the victim testified that she was uncertain about the cause of the injuries.[173] On voir dire, the victim stated that she thought the injuries were probably "from running into tables and stuff" while she was intoxicated.[174] She was impeached with her own prior testimony, where she had attributed the injuries to Bell.[175] Judge Singleton wrote:

> Bell argues . . . that the court, not the jury, must determine the relevance of evidence sought to be admitted at trial [under Alaska Rules of Evidence 104(a) and (b)]. In Bell's view, Judge White erroneously ruled that the question of relevance was to be determined by the jury. Second, Bell argues that there was an inadequate foundation for the admission of the photographs because Grant could not positively identify the origins of her injuries. Alaska Rule of Evidence 901 requires the authentication and identification of an exhibit as a condition precedent to its admissibility. We find no error. First of all, we are of the view that Judge White was simply applying [Alaska Rule of Evidence] 104(b) in admitting the photographs. In essence, he was leaving it up to the jury not to determine a legal question, but rather to determine whether the photographs, in fact, depicted injuries inflicted on Grant by Bell. The ultimate relevance of the exhibits depended upon this factual determination which was properly left to the jury. Secondly, we are satisfied that there was sufficient authentication and identification of the photographs. As we noted in our earlier opinion, Grant sought medical attention after each separate beating, and reported both offenses to the police. In each case, she was examined by a treating physician and interviewed by an investigating officer. In this case, the photographs were properly authenticated by the investigating officer and the attending physician. Under the circumstances, it was a factual question as to whether the photographs accurately depicted injuries inflicted upon Grant by Bell.[176]

171. No. A-1873, 1988 WL 1513110 (Alaska Ct. App. Nov. 23, 1988)
172. *Id* at *2–3.
173. *Id.* at *2.
174. *Id*.
175. *Id*.
176. *Id*. at *3 (citation omitted).

The *Bell* court squarely rejected a defense claim that resolution of disputed facts was a role for the judge.[177] Instead, it specifically held that the relevance of the photographs was an issue for the jury, not the judge.[178] It also implicitly held that conditional relevance could be satisfied by foundational evidence contained in a prior inconsistent statement.[179]

E. Defense Applications

As we have seen, the Rule 104(b) "reasonably debatable" standard governs admissibility where relevance depends on a disputed factual issue. This Article focuses on challenges to prosecution evidence; yet, the rule is party-neutral. Theoretically, Rule 104(b)'s proponent-friendly, liberal admissibility threshold applies regardless of the proponent's identity. In other words, the rule is no different for the defense lawyer than it is for the prosecutor.

In criminal cases, however, the prosecutor bears the burden of proof and thus presents his evidence first. Appellate challenges are most commonly mounted by criminal defendants to admission of the prosecution's evidence, and rarely the other way around.[180] Accordingly, in the preceding sections, we have seen illustrative examples of Alaska courts applying Rule 104(b) to the prosecutor's conditionally relevant evidence. Can defense attorneys employ the same evidentiary principle to secure admission of defense evidence?

1. Self-defense; Awareness of Opponent's Prior, Specific Violent Acts

What if the defendant in an assault prosecution claims that he was aware of a prior, specific, violent act committed by the victim? Furthermore, what if the defendant asserts that knowledge caused him to be afraid of the victim, providing support for his claim that he acted reasonably in self-defense? Alaska law has long held that the evidence of prior specific violent conduct of which the defendant is subjectively aware is admissible in support of a self-defense claim.[181] But what if the

177. *Id.*

178. *Id.*

179. *Id.* In Alaska, a prior inconsistent statement may be considered for its substantive truth, not merely for its impeachment value. *See* State v. Batts, 195 P.3d 144, 158 (Alaska Ct. App. 2008) (citing Beavers v. State, 492 P.2d 88, 94 (Alaska 1971)); *see also* COMMENTARY TO THE ALASKA R. EVID. 801(d)(1)(A) (drawing a contrast to the federal rule)).

180. For a rare example of a prosecution appeal of disputed conditionally relevant defense evidence, see People v. Lyle, 613 P.2d 896, 899 (Colo. 1980).

181. *See, e.g.*, McCracken v. State, 914 P.2d 893 (Alaska Ct. App. 1996) (explaining that a defendant who admits to assault but claims self-defense is entitled to introduce evidence establishing his awareness of specific violent acts

prosecutor objects that the evidence is insufficient to establish that the defendant was "really" subjectively aware of the prior assaultive event before the charged assault? What if the prosecution objects that the defendant's claim is fabricated and claims that the defendant only learned of his opponent's prior violent acts from reading police reports provided in discovery *after* he was charged?

While no Alaska case squarely answers these questions, Rule 104(b) does provide some guidance. The issue is a classic example of conditional relevance. If the defendant was aware of the past act before the charged assault, his testimony on the point is admissible. If he was not aware of the act, then it is irrelevant. Thus, whether the defendant knew of a prior specific violent act beforehand is a *factual controversy*, which the defendant is entitled to have resolved by the jury.

Rule 104(b) governs the court's ruling. If the defense attorney can present evidence "sufficient to support a finding" that the defendant was aware of the victim's prior acts before the charged assault, the judge has a duty to submit the issue to the jury for its determination.[182] Perhaps surprisingly, only a single, unreported Alaska appellate decision addresses this issue, and then only obliquely.[183] At least one sister state court has expressly held that Evidence Rule 104(b) governs this issue.[184]

2. Prior False Claim of Sexual Assault

As we have seen, in the thirty years since the supreme court's promulgation of Alaska's evidence rules, Alaska courts have repeatedly held that admissibility of conditionally relevant evidence is governed by Rule 104(b). In one recent case, however, the Alaska Court of Appeals

committed by decedent to prove reasonableness of his action); James Fayette, *If You Knew Him Like I Did, You'd Have Shot Him Too…: A Survey of Alaska's Law of Self-Defense*, 23 ALASKA L. REV. 171, 219–22 (2008).

182. Smith v. State, No. A-7964, 2004 WL 719993, at *5 (Alaska Ct. App. Mar. 31, 2004).

183. *See* Thompson v. State, No. A-3055, 1990 WL 10509491, at *3–5 (Alaska Ct. App. Nov. 21, 1990) (holding that the evidence that the defendant knew of a prior bad act by the victim, causing his fear, was "tenuous" and could thus be excluded as failing to satisfy Rule 104(b)). The *Thompson* opinion is interesting for two reasons. First, the *Thompson* court's holding that the third-party report of the prior bad act was not "hearsay" because it was not offered for its truth foreshadowed, by six years, the *McCracken* holding. *See id.* at *4. Second, the 1990 *Thompson* opinion was written by Superior Court Judge Elaine Andrews, seated as a court of appeals judge, *pro temp*. *See id*. at *1. Twelve years later, Judge Andrews presided over the *Edwards* homicide trial. *See generally* Trial Transcript, *supra* note 3.

184. *Lyle*, 613 P.2d at 899 (holding that the defendant offered sufficient direct and circumstantial evidence that he was aware of the decedent's prior bad acts to satisfy Rule 104(b), triggering admission of the evidence to the jury).

departed from its own precedent and from Rule 104(b). As this section explains, that opinion, *Morgan v. State*,[185] is inconsistent with the court of appeals' own precedent and is arguably constitutionally infirm.

In *Covington v. State*,[186] the court of appeals held that a defendant charged with sexual assault may offer proof that the victim had made previous false accusations of sexual assault, despite the usual rule against impeachment by proof of a witness's specific prior false statements.[187] Seventeen years later, in *Morgan*, the court of appeals clarified *Covington*, holding that a prior specific false report of sexual assault was only admissible if the defendant could *convince the trial judge by a preponderance of the evidence* that: (1) the complaining witness made another accusation of sexual assault; (2) this accusation was factually untrue; and (3) the complaining witness knew that the accusation was untrue.[188]

The *Morgan* court incorrectly declined to apply Rule 104(b) to what is clearly a disputed factual issue. If the prior report was "really" false, it should be deemed relevant and admissible under *Covington*. If the prior report was "really" true, then it is not relevant. Therefore, it should be the jury that determines whether the prior claim was true or false. There is no intellectually sound way to distinguish this factual dispute from the admissibility of a disputed defendant's statement, disputed motive evidence, or the commission of prior relevant acts.[189] The policy reasons that the *Morgan* court claims support its result are unpersuasive. The *Morgan* court stated:

> [I]f we were to adopt the "some evidence" test used in Louisiana and Wisconsin, a test which merely requires sufficient evidence to put the matter in doubt, then we would be encouraging trials within trials, and we would also throw open the doors to debates about a complaining witness's sexual history based on dubious evidence.[190]

185. 54 P.3d 332 (Alaska Ct. App. 2002).

186. 703 P.2d 436 (Alaska Ct. App. 1985).

187. *Id.* at 441–42. The *Covington* court held that false report evidence was admissible if, as a foundational matter, the defendant established the falsity of the prior accusations "as, for example, where the charges somehow had been disproved or where the witness had conceded their falsity . . . ." *Id.*

188. *Morgan*, 54 P.3d at 333; *see also* Copeland v. State, 70 P.3d 1118, 1124 (Alaska Ct. App. 2003) (holding that the testimony of a man previously accused of sexual assault by the victim was inadmissible because there was insufficient evidence to support his story).

189. Thus, *Morgan* is squarely at odds with *Marino*, *Thompson*, *Bennett*, *Ayagarak*, *McCormack,* and *Smith*.

190. *Morgan*, 54 P.3d at 339.

But as Alaska's evidence rules recognize, and as we have seen, resolution of *factual* disputes is the proper province of the jury.[191] Litigation of the truth or falsity of a discrete, prior false accusation may be time-consuming, but it represents time well-spent for a defendant facing the prospect of decades of incarceration. It is no more time-consuming than litigating disputes about the defendant's true motive, his prior statements, or his commission of past relevant acts—all of which the court of appeals has analyzed under Rule 104(b).[192]

Alaska's trial judges retain broad discretion to place reasonable limits on the presentation of cumulative or distracting evidence and may even limit the proponent to a pre-approved list of leading questions.[193] Thus, the *Morgan* court's fears about "trials within trials" are unsound. Finally, evidence of a prior false report of a sexual assault does not run afoul of the rape shield statute, because that statute is limited to evidence of the victim's sexual conduct.[194] A false report of a sexual assault is *not* evidence of sexual conduct; rather, it is evidence of a specific *false* allegation of sexual conduct.[195]

Constitutionally, *Morgan* is open to criticism, because it creates the possibility that a defendant may be denied the opportunity to prove that his accuser lied in the past where he offers "reasonably debatable" proof that the *jury* might credit, *but which fails to subjectively convince the judge.* Viewed in this light, *Morgan* is inconsistent with the defendant's right to

191. As Judge Coats acknowledged in his *Morgan* concurring opinion, "whether [the witnesses supporting Morgan's claim that his accuser made false allegations] were credible or not is the kind of question that fact finders deal with on a regular basis." *Id.* at 341.

192. Courts examined the following cases under ALASKA R. EVID. 104(b): *Smith*, *McCormack* (motive), *Marino* (statements), and *Ayagarak* (past relevant acts).

193. *See* ALASKA R. EVID. 611(a)(2)–(3); Heaps v. State, 30 P.3d 109 (Alaska Ct. App. 2001).

194. Admissibility of testimony about a victim's "previous sexual conduct" is governed by Alaska's rape shield statute. ALASKA STAT. §12.45.045(a) (2008).

195. The statute requires a judicial finding of relevance prior to admission of such evidence. *Id.* Alaska law bars prior sexual conduct evidence when the "relevance" of this evidence rests on the impermissible inference that the victim is likely to have freely engaged in sexual relations with the defendant because the victim had freely engaged in sexual relations with other people. Napoka v. State, 996 P.2d 106, 108 (Alaska Ct. App. 2000); *see also* State v. DeSantis, 456 N.W.2d 600, 605 n.4 (Wis. 1990) (collecting cases which hold that rape shield statutes do not bar evidence of a prior untruthful accusation, because the proponent usually seeks to prove that the claim was false).

have a jury decide disputed facts,[196] and with his right to present a defense.[197]

Morgan is all the more curious because it seemingly stands at odds with a decision reached by the court of appeals just two years earlier. In *Weaver v. State*,[198] the defendant was charged with sexual abuse of a teenage girl.[199] He sought to prove that the victim fabricated the allegation, arguing that the victim had become sexually active with other partners prior to his indictment.[200] He theorized that the victim fabricated the allegation to engender sympathy because she was afraid her parents would discover her sexual activity.[201] The trial judge excluded testimony about the victim's prior sexual conduct.[202] The court of appeals noted that the testimony was not barred by the rape shield statute, because Weaver did not seek to prove the victim's general promiscuity.[203] They also found that the trial judge erred in part, because he based his ruling on a specific finding regarding the chronology of the prior sexual conduct.[204] Because testimony on this point was disputed, it was erroneous for the judge to resolve this issue. Judge Mannheimer explained:

> One aspect of Judge Card's ruling appears to be mistaken. As explained above, most of the witnesses testified that Veronica became sexually active in May 1997, but one witness testified that she became sexually active in January 1997. Judge Card credited the majority of the witnesses and ruled that Veronica had become sexually active in May. The judge should not have resolved this discrepancy. When a party seeks to introduce evidence, and the relevancy of that evidence turns on the resolution of a subsidiary question of fact, a trial judge should

196. *See* Folger v. State, 648 P.2d 111, 113–14 (Alaska Ct. App. 1982) (holding that even weak and doubtful self-defense claims are to be resolved by the jury).

197. *See* Smithart v. State, 988 P.2d 583, 591 (Alaska 1999) (quoting *Keith v. State*, 612 P.2d 977, 984 (Alaska 1980) ("Defendants are 'entitled to present [their] version of the events and the evidence supporting it in as full a manner as possible.'")); s*ee also* Olden v. Kentucky, 488 U.S. 227, 233 (1988) (restricting cross-examination of victim in a sexual assault case regarding her cohabitation with a third party deprived the defendant of his Sixth Amendment right to confront adverse witnesses); United States v. Platero, 72 F.3d 806, 814–16 (10th Cir. 1995) (excluding evidence, in sexual assault case, about the alleged victim's romantic or sexual relationship with a third party violated the defendant's confrontation rights).

198. No. A-7081, 4271, 2000 WL 1287937 (Alaska Ct. App. Sept. 13, 2000).

199. *Id.* at *1.

200. *Id.* at *2.

201. *Id.*

202. *Id.* at *3.

203. *Id*.

204. *Id.* at *4.

> admit the offered evidence "upon, or subject to, the introduction of evidence sufficient to support a finding" in the moving party's favor on this subsidiary question of fact. Thus, if the relevance of Veronica's sexual activity had hinged on whether that activity occurred in May 1997 or in January 1997, then Judge Card should have admitted the evidence—because Weaver presented a foundational witness who testified that Veronica's sexual activity occurred in January.[205]

Ultimately, while acknowledging that the trial judge violated Rule 104(b) by deciding a disputed factual issue, the *Weaver* court affirmed the trial judge's exclusion of the defense evidence under Rule 403—finding that testimony about the victim's prior sexual conduct was likely to be confusing and unfairly prejudicial *to the prosecution*.[206] The *Weaver* court reaffirmed, in dicta, that reasonably debatable disputed factual issues are properly submitted to the jury under Rule 104(b).[207] Yet, two years later, the *Morgan* court reached the opposite conclusion: that defense claims of a specific past false allegation—a disputed factual event—was *not* subject to Rule 104(b) analysis. However, the allegation was subject to *the trial judge's* ruling that falsity was established by a preponderance—a procedure essentially identical to Rule 104(a).[208] Therefore, it is very difficult to reconcile *Weaver* with *Morgan*—and equally difficult to reconcile *Morgan,* which affirmed exclusion of exculpatory *defense* evidence, with the post-2003 Alaska Rule 104(b) cases that affirmed admission of disputed, inculpatory *prosecution* evidence. When one compares the *Morgan* holding with the post-2003 Alaska cases discussed in this Article, the best one can say is that *Morgan* is intellectually inconsistent.[209]

---

205. *Id.* (citation omitted). Judge Card's error resonates with United States v. Koontz, 143 F.3d 408, 411–12 (8th Cir. 1998) (the ruling was error where the trial judge admitted a disputed jail booking report based upon his subjective belief that the subject of a disputed jail booking report and a defense trial witness were "the same person"; the issue was one for the jury, not the judge).

206. *Id.* at *5.

207. *Id.* at *4.

208. In fact, the *Morgan* court drew a direct comparison to admissibility of co-conspirator statements, which is governed by Rule 104(a). Morgan v. State, 54 P.3d 332, 339 n.36 (Alaska Ct. App. 2002) (citing Arnold v. State, 751 P.2d 494, 502 (Alaska Ct. App. 1988)); *see also* Bourjaily v. United States, 483 U.S. 171 (1987) (Federal Rule of Evidence 104(a) governs preliminary findings regarding the existence and duration of a conspiracy and admissibility of co-conspirator statements).

209. *Morgan* also raises a technically intriguing ambiguity. We know from *Bourjaily* and Rule 104(a) itself that the judge is not bound by the rules of evidence when ruling on preliminary matters. Thus, the judge may consider otherwise inadmissible hearsay when deciding whether the accused belonged to a conspiracy and the duration of a conspiracy. Therefore, if a *Morgan*

CONCLUSION

Mark Edwards was convicted of two counts of first-degree murder for killing Mona Edwards and Maela Crabtree.[210] Edwards died in jail in 2004.[211] Because Edwards died with a pending appeal, his appeal was mooted, and his convictions were posthumously vacated.[212] Therefore, Judge Andrews' ruling regarding admissibility of Mona's letter escaped appellate review.

But, as we have seen in this Article, in the years since Edwards' 2002 trial, the Alaska Court of Appeals has decided *five* Rule 104(b) cases.[213] In each case, the court affirmed admission of disputed prosecution evidence where the evidence was "reasonably debatable" and where the proponent offered "evidence sufficient to support" the jury's finding that the event occurred. Twice, the court relied upon Rule 104(b) to affirm admission of disputed prosecution motive evidence—which was exactly the prosecution's goal in the *Edwards* trial.[214] With the benefit of perfect hindsight, one can now see that Judge Andrews' 2002 ruling was correct. It is equally clear that had Mark Edwards lived, he would have seen Judge Andrews' ruling regarding the admissibility of Maela's letter and his conviction affirmed.

To busy criminal law practitioners, the law of conditional relevance is a seemingly obscure evidentiary nuance. However, as we have seen, Rule 104(b) haunts criminal trial fact patterns with startling frequency. The rule comes into play whenever factual disputes arise regarding

preliminary hearing is essentially governed by Rule 104(a), as the court implied, is the defendant bound by the rules of evidence at this hearing? Rule 104(a) and *Bourjaily* would support an argument that the court is *not* bound by the rules of evidence at such a preliminary hearing. If this is true, then could the defendant offer rank hearsay to the judge at the preliminary hearing regarding the falsity of the victim's prior claim? Or could the prosecutor offer rank hearsay establishing that the prior claim was *true*? Unfortunately, the *Morgan* opinion does not reach this point.

210. Edwards v. State, No. A-8507 (Alaska Ct. App. Jan. 21, 2003) (statement of points on appeal) (on file with the Alaska Law Review).

211. Sheila Toomey, *Man Who Killed Wife, Her Roommate Dies in Prison*, ANCHORAGE DAILY NEWS, July 8, 2004.

212. If a defendant in a criminal case dies while his appeal is pending, the judgment against the defendant is vacated and the charges against him are abated *ab initio*. Hartwell v. State, 423 P.2d 282, 284 (Alaska 1967). For an interesting discussion of this issue, see McCurdy v. State, No. A-08816, 2006 WL 2390260, at *1 (Alaska Ct. App. Aug. 18, 2006).

213. *See, e.g.*, Bennett v. State, 205 P.3d 1113 (Alaska Ct. App. 2009); Thompson v. State, 210 P.3d 1233 (Alaska Ct. App. 2009); McCormack v. State, No. A-9870, 2008 WL 5352364 (Alaska Ct. App. Dec. 24, 2008); Smith v. State, No. 1912, 2004 WL 719993 (Alaska Ct. App. Mar. 31, 2004); Ayagarak v. State, No. A-8066, 2003 WL 1922623 (Alaska Ct. App. Apr. 23, 2003).

214. *McCormack*, 2008 WL 5352364 at *3–4; *Smith*, 2004 WL 719993, at *4.

"other relevant acts" testimony, proof of motive, disputed statements, and audio recording or photographic authenticity. For these reasons, prosecutors in particular should be very familiar with the principles explained in this Article.

While most frequently prosecutors will make use of this principle, as we have seen, defense attorneys can, and should, invoke the same rule in appropriate circumstances. The Authors hope this discussion will be of use to the bench and the Bar when such issues arise again in the future.